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No. 89-55

In The

Supreme Court of the United States

October Term, 1989

CAROL L. PETTYJOHN,

Petitioner,

vs.

KALAMAZOO CENTER CORPORATION
d/b/a KALAMAZOO HILTON INN,
a Michigan Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Issue: WHETHER THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY RELIED UPON MICHIGAN LAW WHEN IT CONCLUDED THAT EVIDENCE OF A PRIOR ACCIDENT IS NOT ADMISSIBLE TO SHOW NOTICE, WHERE THE ACCIDENTS WERE DISSIMILAR?

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PRELIMINARY STATEMENT

Respondent, Kalamazoo Center Corporation respectfully requests that this court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case.

STATEMENT OF THE CASE

The Petitioner, Plaintiff below, Carol Pettyjohn, filed suit against the Defendant, Kalamazoo Center Corporation (hereinafter referred to as Kalamazoo Hilton), in the United States District Court of Michigan, Western District; jurisdiction was based upon diversity under 28 U.S.C. § 1332. The Petitioner alleged that the Kalamazoo Hilton was responsible for injuries that she suffered as a result of a slip and fall in the shower-tub combination in her hotel room at the Kalamazoo Hilton. She claimed that the Kalamazoo Hilton was negligent in failing to use reasonable care in the maintenance of the premises, that it breached its duty of an implied warranty of suitability and an implied warranty of merchantability. After a nine (9) day trial, the jury returned a verdict of $58,500 against the Kalamazoo Hilton. The Kalamazoo Hilton appealed to the United States Court of Appeals for the Sixth Circuit.

On appeal, the Sixth Circuit Court of Appeals reversed. *Pettyjohn v. Kalamazoo Center Corp.*, 868 F.2d 879 (CA6 1989). The Sixth Circuit Court of Appeals concluded that certain evidence was erroneously admitted and it reversed and remanded the matter to the trial court for a new trial. The Petitioner filed for a rehearing *en banc*, but that was denied. Petitioner now brings a petition for a writ of certiorari, seeking review by this Court.

For purposes of consideration by this Court, a number of facts will be set forth which were omitted by the Petitioner in her Statement of Facts.

Mrs. Pettyjohn slipped and fell in her hotel room shower-tub on August 19, 1980. After riding in an automobile for 23 hours, she and her companions checked

into the hotel. After her three companions showered, dressed and left the room, Pettyjohn used the shower-tub. She stepped into the shower, which had adhesive anti-slip strips. As water backed up, she backed up in the tub and in reaching to put the soap along the ledge of the tub, she fell, struck her arm and was injured.

At the trial, Pettyjohn attempted to have admitted certain testimony regarding a prior slip and fall which had allegedly occurred at the Kalamazoo Hilton. Pettyjohn introduced by deposition the testimony of an attorney, Thomas Oehmke, who represented one Dr. Feuer for purposes of writing a letter on his behalf regarding an alleged slip and fall in a shower-tub at the Kalamazoo Hilton in May, 1978. Oehmke, over the strenuous objections of the Kalamazoo Hilton, testified that Feuer told him that while Feuer was taking a shower, he fell in the shower-tub. Oehmke testified that Feuer told him that there were no adhesive strips when Dr. Feuer was there, and that no one else used the shower before him. The Kalamazoo Hilton claimed that all of this evidence was inadmissible hearsay; further, as described, the accidents were dissimilar in that the circumstances were different from the Plaintiff's circumstance as there were no anti-slip strips in the tub, no evidence of water backing up and no prior use of the shower.

The district court held that the accidents were in fact dissimilar and that the prior accident was not admissible for purposes of showing negligence. The district court, however, held that the accident was admissible as it pertained to the issue of notice of a hazardous condition and allowed Oehmke's testimony regarding Feuer's slip and fall to be considered by the jury. On appeal, the

Kalamazoo Hilton claimed such evidence was erroneously admitted.

The Sixth Circuit Court of Appeals agreed and reversed. The Court found that it was prejudicial error to admit evidence of a dissimilar, prior accident for the purpose of showing notice. The Court held that the district court misapplied a Michigan case, *Freed v. Simon*, 370 Mich 473, 12 N.W.2d 428 (1963), when it permitted evidence to be admitted for the purpose of showing that the Defendant had notice of a dangerous condition. *Pettyjohn* at 881. In Michigan, as in many other jurisdictions, evidence of prior accidents, if similar, may be used to show notice of a dangerous condition. See, generally, 21 A.L.R. 4th 472 (1983), and the cases cited therein.

The Court of Appeals noted that the district court ruled that the two accidents were not similar. The Court held that if the accidents were dissimilar, then testimony regarding the first accident was inadmissible either to show notice of a dangerous condition or negligence. *Id.* The Court concluded that Oehmke's testimony was clearly irrelevant and as such, it was not necessary to reach the issue whether, if relevant, the testimony should be nonetheless excluded as hearsay pursuant to Fed. Rule Evid. 402. *Id.* The Court then remanded the matter for a new trial.

The Petitioner now seeks a writ of certiorari before this Court.

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

The decision of the Sixth Circuit Court of Appeals, in reversing and remanding this matter for a new trial, was eminently correct. The issue raised by the Petitioner is not meritorious, as, in diversity suits, it has been long recognized that state substantive law may impact on the evidence admitted by a federal district court. In this case, the question involved the admissibility of evidence of a prior accident to show notice of a dangerous condition. A review of the case law demonstrates that the federal courts consider state precedent on such issues as notice when considering the admissibility of evidence. There is nothing novel in that concept, and the Petitioner's argument that state law is to be wholly disregarded in diversity actions is plainly wrong.

Moreover, the Petitioner, in asserting that Federal law solely controls the admissibility of evidence in diversity suits, has failed to demonstrate that the result would have been different were that so. The Petitioner has set forth no case law, or any other authority, for the proposition that notice of a dangerous condition may be proven by the admission of evidence of a dissimilar, prior accident. There is no case authority for that proposition, and the Petitioner sets forth no reason why this Court should make such a radical departure from established case law. Thus, the Petitioner has not shown that even if her contention were correct, that it would mandate a different result.

Further, the Petitioner ignores the fact that the evidence which was admitted into trial was inadmissible hearsay. The Sixth Circuit did not rule on the issue, as it

was not necessary, and the Petitioner has failed to demonstrate that this evidence was properly admitted. Again, there is no showing that Petitioner would ultimately prevail, even if she prevailed on the issue which has been raised.

Finally, as a matter of policy, the petition should be denied. Review by granting the writ of certiorari should be sparingly exercised, and should only be utilized in those cases of significant gravity and general applicability. See, Sup. Ct. Rule 17, *Forsyth v. Hammond*, 166 U.S. 506 (1897). The argument raised by the Petitioner is without merit and does not meet that standard. This Court should refuse to exercise its jurisdiction in this case.

ARGUMENT

I. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY RELIED UPON MICHIGAN LAW WHEN IT CONCLUDED THAT EVIDENCE OF A PRIOR ACCIDENT IS NOT ADMISSIBLE TO SHOW NOTICE, WHERE THE ACCIDENTS WERE DISSIMILAR.

The Petitioner argues that the decision of the Sixth Circuit Court of Appeals constitutes a rewriting of the Federal Rules of Evidence and that the Sixth Circuit Court of Appeals misapplied *Erie v. Tompkins*, 304 U.S. 64 (1938) when it utilized Michigan law. A reading of the decision does not impel such a conclusion. On the contrary, the Sixth Circuit Court of Appeals properly concluded that evidence of a prior accident where the facts are dissimilar is not admissible to show either notice of a

dangerous condition or negligence. Such a finding by the Sixth Circuit Court of Appeals does not rewrite or overrule the Federal Rules of Evidence. The decision of the Sixth Circuit Court of Appeals was correct, and the petition for writ of certiorari should be denied.

The question raised by the Petitioner is whether the Sixth Circuit Court of Appeals should have considered *Freed* at all. Petitioner asserts that the Court of Appeals could not rely upon state law to guide its consideration regarding the issue of notice when evidence of prior accidents is introduced in diversity actions brought in the federal courts. While the Petitioner's argument begs the question whether under the Federal Rules of Evidence, dissimilar accidents may be used as evidence to show notice of a dangerous condition, the Petitioner nonetheless asserts that reliance on state law is misplaced as it relates to the applicability and evidentiary value of prior accidents and the issue is solely governed by the Federal Rules of Evidence. A review of the case law, however, does not support the position of the Petitioner.

It is axiomatic that in a diversity action, state substantive law is to be applied by the district court. See *Erie*. It is also true that the procedural rules to be used in diversity actions are controlled by federal law. See *Hanna v. Plumer*, 380 U.S. 460 (1965). The issue arises when federal procedure is impacted by the state substantive law. While the Federal Rules of Evidence clearly set forth the procedure under which evidence is to be admitted in federal court, it does not necessarily follow that state law

is to be disregarded. In diversity actions, state substantive law may impact upon what evidence is to be admitted. This has been a long recognized concept, and it plainly covers the situation in the case at bar.

The issue of admissibility of prior accidents in federal cases has most often arisen in cases involving accidents at railroad crossings. Federal courts, subsequent to the enactment of the Federal Rules of Evidence, have looked to state law when considering whether prior accidents, which occurred at the same railroad crossings, may be admitted for purposes of showing notice of a dangerous condition. See, *Young v. Illinois Cent. Gulf R. Co.*, 618 F.2d 332, 339 (CA5 1980), where the court looked to Mississippi law, *Gardner v. Southern R. Systems*, 675 F.2d 949, 952 (CA7 1982), where the court looked to Indiana law, and *Lerner v. Seaboard Coast Line R. Co.*, 594 F.Supp. 973 (SD N.Y. 1984) and *Roundtree v. Seaboard Coast Line R. Co.*, 418 F.Supp. 220, 223 (MD Fl., 1976), where the courts looked to Florida law.

Prior to the enactment of the Federal Rules of Evidence, the courts looked to the law of the state when determining whether such evidence of prior accidents is admissible. See, *Southern Railway Co. v. Lanham*, 403 F.2d 119, 133 (CA5 1968); *DiFrischia v. New York Central R. Co.*, 307 F.2d 473, 476 (CA3 1962); *Nelson v. Brunswick Corp.*, 503 F.2d 376, 380 (CA9 1974).

It does appear, prior to *Erie*, that while the case of *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842) controlled, that certain federal courts concluded that the issue of admissibility of prior accidents at the same railroad crossing was controlled by Federal law. See *Evans v. Erie R.Co.*, 213

F. 129, 133 (CA6 1914). Since *Erie*, however, federal courts have generally considered the applicability of state law in evaluating the issue. See, *DiFrischia; Illinois Cent. R. Co. v. Sigler*, 122 F.2d 279, 283 (CA6 1941); *Jones & Laughlin Steel Corp. v. Matherne*, 348 F.2d 394, 400 (CA5 1965).

The rationale for looking to state law regarding certain evidentiary issues was set forth in *Conway v. Chemical Leaman Tank Lines, Inc.*, 540 F.2d 837 (CA5 1976). The Court considered the admissibility of certain evidence (in that case, evidence of the ceremonial remarriage of the Plaintiff) in a wrongful death action. In considering the impact of state law, the Court stated:

> In such and similar circumstances, federal courts have long recognized an exception to the inapplicability of *Erie* to evidentiary questions:
>
> > Although, as has been indicated, the courts have held the Erie doctrine inapplicable on questions of evidence, other than those of privilege, it must be remembered that some matters often thought of as part of the law of evidence are not governed by Rule 43( ). Burden of proof is an issue of substance, controlled in diversity cases by state law. The misnamed "parol evidence rule" is not a rule of evidence at all but of substantive law, and state law must be applied. *Finally, there are circumstances in which a question of admissibility of evidence is so intertwined with a state substantive rule that the state rule excluding the evidence will be followed in order to give full force to the state's substantive policy.* 9 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2405, at 326-27 (1971). (Emphasis supplied).

Id. at 839.

As it pertains to certain evidentiary issues, state law plainly impacts upon the type and nature of evidence which may be considered by a jury in a diversity action.

This was also the conclusion reached in *In Re Air Crash Disaster Near Chicago, Ill.*, 701 F.2d 1189, 1193 (CA7 1983), wherein the Seventh Circuit Court of Appeals held:

> It does not follow, however that state evidence rules have no bearing on what evidence is admissible in federal court, for the relevance of the evidence is ascertainable only by reference to the substantive law of the state. To the extent that the state evidentiary rule defines what is sought to be proved – here, the measure of damages – it may bind the federal court under *Erie* principles.

Further, it is clear from the legislative history of the Federal Rules of Evidence that Congress was sensitive to the impact of state law regarding evidentiary issues. See, for example, the House Judiciary Committee report on the issue of privilege and competency, H.R. 93-650, 28 U.S.C. App., p. 644-645. Where the claim or defense was grounded in state law, federal interest was insufficient to justify the departure from state policy.

Such considerations are applicable in the case at bar. In a diversity action sounding in tort, state case law on the admissibility of evidence regarding prior accidents is relevant to a district court's determination of admissibility. The fact that this was recognized by the Court of Appeals in the case at bar does not imply, as argued by the Petitioner, that the Court has held that state law governs the admissibility of evidence in federal courts. Rather, it is a recognition that there may be certain instances where there is no compelling reason for the

federal policy to override or modify substantive state law. If there were instances in which the Federal Rules permitted the admission of significantly different evidence on the same issue when compared to state courts, that would promote the type of forum shopping which appears to have concerned Congress when it initially enacted the Federal Rules of Evidence. See, H.R. 93-650, 28 U.S.C., App., p. 644-645. Consideration of state law and policy is entirely appropriate when considering what type of evidence should be admitted as evidence in diversity actions.

The Sixth Circuit Court of Appeals appropriately considered *Freed* as relevant to the district court's determination, and concluded, correctly, that the district court had misread it. The decision of the Sixth Circuit Court of Appeals is correct and the writ of certiorari should be denied.

II. THERE IS NO AUTHORITY FOR THE PROPOSITION THAT A DISSIMILAR, PRIOR ACCIDENT MAY BE ADMITTED TO SHOW NOTICE OF A DANGEROUS CONDITION, AND THERE IS NO SHOWING THAT THE RESULT WOULD BE DIFFERENT IF THE ISSUE WERE SOLELY CONTROLLED BY FEDERAL LAW.

The Petitioner has cited no authority for the proposition that under the Federal Rules of Evidence, a prior accident, determined to be dissimilar in time and circumstances, may nonetheless be used as evidence of negligence, or as evidence placing the defendant on notice of a

dangerous condition. The Petitioner argues that the accidents were "somewhat similar". (Petitioner's Brief, p. 5) The trial court found differently, ruling that the accidents were dissimilar, and that finding was determined to be correct by the Sixth Circuit Court of Appeals. *Pettyjohn* at 881. For there to be any modification in the decision of the Sixth Circuit Court of Appeals, this Court must thus find either, as a matter of factual determination, that the accidents were similar or that under the Federal Rules of Evidence, prior accidents dissimilar in circumstances are admissible to show notice of a dangerous condition.

The Petitioner has made no request that this Court reevaluate the factual determination of dissimilarity made and affirmed by the Courts below. Therefore, in order for the Petitioner to prevail, this Court must rule that as a matter of federal evidentiary policy, it is not necessary to show that the prior accident was similar in circumstances when laying the foundation to admit evidence of a prior accident to show notice of a dangerous condition. There is, however, no basis for making such a ruling.

First, as noted before, there is no case support for such a proposition, and none has been cited by the Petitioner. Secondly, as a matter of logic, the proposition makes no sense. As stated by the Sixth Circuit Court of Appeals, it is illogical to conclude that a dissimilar prior accident places one on notice regarding the cause of a subsequent accident. It simply does not follow. Those federal courts which have considered the issue of the admissibility of evidence of prior accidents examine the generally accepted requirements of similarity in time and circumstance in order to guide their determination. See,

Young at 339; *Jones & Laughlin* at 400-401; *Roundtree* at 233; *DiFrischia* at 476.

The rationale for limiting the evidence to similar accidents is clear. It is only logical to require that there must be some showing that the same cause existed to produce the subsequent accident. Otherwise, the admission of unrelated accidents would only serve to prejudice the defendant and bring collateral issues before the trier of fact. Indeed, even in these cases where the accidents are similar, a balancing of the probative value, in relation to the prejudice, needs to be made. As set forth by the Ninth Circuit Court of Appeals:

> But whether to admit such evidence is a matter generally for the trial court to decide, keeping in mind the collateral nature of the proof, the danger that it may afford a basis for improper inferences, the likelihood that it may cause confusion or operate to unfairly prejudice the party against whom it is directed and that it may be cumulative, etc. *McCormick, Supra* at 473.

Nelson at 380.

Courts consider whether the evidence of the prior accident is relevant (that is, similar), and then consider whether, if so, its probative value is outweighed by the potential prejudice. See, *Gardner*, at 952; Fed. Rule Evid. 403; 21 A.L.R. 4th 472, 484 (1983) and the cases cited therein.

It can be seen that there is no basis for finding that the Court of Appeals erred in making its ruling. Once it was determined that the accidents were dissimilar, whether under state or federal law, evidence of the prior accident is inadmissible. The Sixth Circuit Court of

Appeals did not err, and the petition for writ of certiorari should be denied.

There is one final point. Because it was not necessary, the Sixth Circuit Court of Appeals did not decide whether the testimony should nonetheless be excluded as hearsay. It is clear that Oehmke, the attorney, cannot testify regarding what a non-party client told him, regarding events for which Oehmke did not observe. As set forth in Fed. Rule Evid. 801 (c), hearsay is:

> "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Unless otherwise provided by rules of this Court, or by act of Congress, hearsay is not admissible. See, Fed. Rule Evid. 402, 802.

The statements of Oehmke relating what Feuer told him regarding an alleged slip and fall are not admissible, as those statements are classic hearsay. The Petitioner sought to use throughout the trial the testimony that Feuer slipped in a showertub at the Hilton Hotel and that the Respondent was placed on notice of a dangerous condition. Testimony by Oehmke introduced at trial regarding what Dr. Feuer said was plainly inadmissible.

Thus, in order for the Petitioner to prevail, she must demonstrate that not only did state law not apply and that the Federal Rules of Evidence would compel a different result, but that the hearsay testimony was admissible. No such showing can be made. The Petitioner cannot show that reversing the Sixth Circuit Court of Appeals on

the issue raised will change the result. Under such circumstances, the petition for writ of certiorari should be denied.

CONCLUSION

The Sixth Circuit Court of Appeals properly concluded that inadmissible evidence was admitted at trial, which prejudiced the defendant and required a reversal and a remand for a new trial. For the reasons set forth above, the Kalamazoo Hilton respectfully requests that the instant petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit be denied and that Respondent be awarded appropriate damages pursuant to Rule 49.2 of the Rules of the Supreme Court on the grounds that the instant petition is clearly frivolous.

Respectfully submitted,

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APPENDIX

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES, PURSUANT TO RULE 28.1.

The Defendant Kalamazoo Center Corporation d/b/a Kalamazoo Hilton is a wholly owned subsidiary of the Corporation Inland Steel Industries, Inc. It is affiliated with other corporations, but those corporations are all wholly owned subsidiaries of Inland Steel Industries, Inc.

There is, however, an additional corporation which is publicly owned and not a party to this appeal, but that has a financial interest in the outcome. That corporation is the SAFECO Corporation which has the following subsidiary companies:

PROPERTY AND CASUALTY

SAFECO Insurance Company of America
General Insurance Company of America
First National Insurance Company of America
SAFECO National Insurance Company
SAFECO Insurance Company of Illinois
SAFECO Surplus Lines Insurance Company
F.B.Beattie and Co., Inc.

LIFE AND HEALTH

SAFECO Life Insurance Company
SAFECO National Life Insurance Company
SAFECO Administrative Services, Inc.

REAL ESTATE

SAFECO Properties, Inc.
Winmar Company, Inc.
SAFECARE Company, Inc.
SAFECARE Health Services, Inc.

OTHER

SAFECO Credit Company, Inc.

SAFECO Securities, Inc.
SAFECO Asset Management Company
SAFECO Services Corporation
PNMR Securities, Inc.